SUPREME COURT, U. S.

FILED
JUN 19 1967
JOHN F. DAVIS, CLERK

No. 260

In The

SUPREME COURT OF THE UNITED STATES

October Term 1966

I. M. AMUSEMENT CORP.,

Appellant,

v.

STATE OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT IN SUPPORT OF NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

ALLEN BROWN
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Counsel for Petitioner.

COURT INDEX PRESS, INC — Law Printers — 207 Walnut Street, Cincinnati, Ohio 45202

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions	4
Statement of Facts	5
Reasons for Issuing the Writ	9
Introductory	9
Question One	10
Question Two	12
Question Three	17
Question Four	18
Question Five	21
Conclusion	22

CONTENTS OF APPENDIX

Appendix A — Judgment Entry of Supreme Court of Ohio	23
Appendix B — Opinion of the Court of Appeals of Ohio, Hamilton County 1st District	24
Appendix C — Opinion of Court of Common Pleas, Hamilton County, Ohio	29
Appendix D — Ohio Revised Code, Sections 2905.34 and 2905.371	30, 31

CASES CITED

	Page
A Quantity of Books v. Kansas, 378 U.S. 205	13
Alberts v. California, 354 U.S. 476	9
Austin v. Kentucky, 384 U.S. 916	11, 20
Friedman v. Maryland, 380 U.S. 51	12
Garrison v. Louisiana, 379 U.S. 64	17
Gent v. Arkansas, 384 U.S. 937	11, 20
Ginzburg v. United States, 383 U.S. 463	17
Grove Press, Inc. v. Gerstein, 378 U.S. 577	20
Manual Enterprises, Inc. v. Day, 370 U.S. 478	20
Marcus v. Search Warrants, 367 U.S. 717	13
Memoirs v. Massachusetts, 383 U.S. 413	19, 20
Mishkin v. New York, 383 U.S. 502	18
Moore v. Dempsey, 261 U.S. 86	17
New York Times v. Sullivan, 376 U.S. 254	17
One, Inc. v. Olesen, 355 U.S. 361	20
Roth v. United States, 354 U.S. 476	9, 15, 16
Redrup v. New York, 384 U.S. 916	10, 17, 19, 20
Smith v. California, 361 U.S. 147	13, 15, 17
Smith v. California, 375 U.S. 259	20
Speiser v. Randall, 357 U.S. 513	13, 16
State of Ohio v. I. & M. Amusements Inc., 10 OhioApp. 2d 153	2
State of Ohio v. Jacobellis, 378 U.S. 184	9, 10, 20, 21
State of Ohio v. Mapp, 170 O.S. 427	10
State of Ohio v. Mapp, 367 U.S. 643	10
State of Ohio v. Mazes, 7 O.S. 2d 136, reversed No. 896 Supreme Court of the United States Oct. Term 1966	10
Sunshine Book Company v. Summerfield, 355 U.S. 372	20
Times Film Corporation v. Chicago, 355 U.S. 835	20
Toth v. United States, 319 U.S. 463	16
Tralins v. Gerstein, 378 U.S. 576	20
Weiman v. Updegraff, 344 U.S. 183	20

In The

Supreme Court of the United States

October Term 1966

No. ———

I. M. AMUSEMENT CORP.,

Appellant,

v.

STATE OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT IN SUPPORT OF NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Appellant prays that an Appeal be granted from the judgment of the Supreme Court of Ohio entered on February 15, 1967, which denied appeal as of right from the Court of Appeals for Hamilton County, Ohio (First Appellate District of Ohio) for the reason that no substantial constitutional question exists therein, and affirmed Petitioner's conviction for exhibiting an obscene motion picture. Notice of Appeal to the Supreme Court of the United States was filed in both the Supreme Court of Ohio and the Court of Appeals, First Appellate District of Ohio, on May 13, 1967. Said decision affirmed the Constitutionality under the 1st and 14th Amendments to the Constitution of the United States of Ohio Revised Code, Section 2905.34.

OPINIONS BELOW

The opinion of the Court of Appeals of the First Appellate District, Hamilton County, Ohio is reported at 10 Ohio App. 2d 153, and printed herein as Appendix A.

The judgment entry of the Supreme Court of Ohio is printed herein as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257 and 2101, and Parts IV and V of the Rules of this Court.

QUESTIONS PRESENTED

The Constitutional questions to be presented by this Appeal, all of which were presented to the trial court except for Question Five which first arose as a question of constitutional magnitude on the appeal from the Court of Appeals to the Supreme Court of Ohio, as shall hereinafter be more fully indicated, and all of which were argued on appeal to the Supreme Court of Ohio and raised at the earliest instance possible in this entire cause are as follows:

(1) Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and falling within the contemporary community standard as not appealing to prurient interest?

(2) Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on

any alleged obscene aspect of the motion picture in question or pandering by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

(3) Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity, charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

(4) Does Ohio's statutory definition of obscenity (O.R.C. § 2905.371) which does not provide for any consideration of redeeming social importance or patent offensiveness offend the First Amendment to the Constitution of the United States? (O.R.C. § 2905.34 and § 2905.371 appear in Appendix C hereof).

(5) On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT TO UNITED STATES CONSTITUTION

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On June 12, 1963, a police officer of the City of Cincinnati, Ohio accompanied by an officer of a group known as Citizens for Decent Literature and Motion Pictures as paid admittees viewed a portion of a film, referred to in the later indictment as "Artist's Models", and a feature movie at the *Imperial Theatre* in that city. The police officer returned the next day to said theatre, once again paying the price of admission. He again observed the self-same portion of the film in question in this cause and thereupon confiscated the same, and cited the corporate defendant for violation of O.R.C. § 2905.34 (Obscenity statute). (R. 4-20)

A motion to dismiss was filed against the subsequent indictment on several grounds, including the unconstitutionality, under the First Amendment to the United States Constitution, of Ohio's obscenity statute O.R.C. § 2905.34 as defined by O.R.C. § 2905.371, and the privileged nature of the charged film. Said motion was overruled without a viewing of the film. On coming on for trial a jury was waived. The State offered no evidence as to the obscenity of

the film, its patent offensiveness, its departure from community standards, or its lack of redeeming social importance. The police officer who seized the film testified *solely* to the facts set forth in the first paragraph of this Statement of Facts. He made no mention of any alleged manager of the theatre or any conversation or dealings, if any, with such a person, or any other corporate agent. (R. 4-20) The film was introduced into evidence and shown in the courtroom for the officer's identification. It consisted of a series of shots of partially nude female models, making no particularly suggestive motions or actions, and some dances commonly known as the strip tease or belly dance. The officer admitted on cross-examination that only about the first half of the same had been shown on the two days in question. The film was silent, but the Court barred questioning on cross-examination that in the showing of it at the theatre a non-inflammatory musical background was provided. (R. 15) The film, as introduced and exhibited in court, bore no title, but was called in the indictment "Artist's Models". (R. 20-21) It was stipulated that there was an existing de jure and de facto corporation known as I. M. Amusement Corporation under the laws of the State of Ohio, but no other evidence of any acts of said corporation was offered. (The Defense never raised the question of variance of name between indictment and corporate charter.) The State then offered evidence that a William Berger signing as an officer of the I. M. Amusement Corporation inserted an advertisement in the Cincinnati Post-Times Star for June 11, 12 and 13 announcing the billing for the Imperial Theatre. A copy of this advertisement referring to a feature picture (not contended by the State to be the picture in question) and a short subject called "Beauteause Models" was introduced into evidence. (Exhibit 2) No evidence was offered to explain the discrepancy or indicate "Beau-

tease Models" was the picture in question. The State then rested. Motion was then made for dismissal, which the Court took under submission, asking for memorandum.

The defendant submitted a memorandum in which state and federal constitutional questions re the lack of obscenity of the film in question, the lack of any state adduced proof of obscenity, the inadequacy of proof of scienter and/or purpose to disseminate as obscene, especially of a corporate entity, as well as constitutional arguments previously advanced in pre-trial motions were advanced.

An additional due process grounds, to-wit, failure of the prosecution to prove the witting offering of the picture in question or adequately any act whatsoever of the defendant, I. M. Amusement Corporation, was also urged. After a passage of approximately two weeks, the prosecution asked and was granted leave to re-open its case. (R. 34) At this time the prosecution introduced evidence that a license had been issued generally to the I. M. Amusement Corporation for the operation of the Imperial Theatre as a motion picture theatre for a fiscal year encompassing June 12 and 13, 1963. (R. 34-42) (No evidence was submitted of the licensing of the film in question, nor is any such required by the ordinances of the City of Cincinnati or the statutes of the State of Ohio. It is assumed that language to the contrary in the third paragraph of the opinion of Hover, J. of the Court of Appeals, First Appellate District of Ohio, reprinted as Appendix A, is a mere inadvertent misstatement of fact.) The State once again rested, and the Court thereupon forthwith denied the motion for dismissal with no comment on any of the multiple constitutional grounds offered in support of said motion. (R. 44) The defense, reserving its exceptions, then offered as a witness the head of Cincinnati's Civic Theatre, The Playhouse in the Park. This witness testi-

fied to his background as follows: He has had post graduate training in the theatrical and cinematographic arts, had written his thesis on theatrical and cinema psychological impact and communal acceptance, and had seven years practical experience in theatrical and movie presentation and production in Princeton, New Jersey, New York, New York, and Cincinnati, Ohio. The Court refused to hear further testimony from this witness that the depictions of the picture in question did not affront existing and widespread contemporary community standards relating to the depiction or representation of the semi-draped female form; that the picture depioted only strip-tease, burlesque dancing, or female tableaux which are accepted theatrical and night club movie conventions of many years standing in both the local and national community, such convention being so established as to have achieved redeeming social value as entertainment. (R. 47-56) The defense then rested. No rebuttal was offered by the State. The Court forthwith returned a verdict of guilty. (Appendix E) . This appeal was carried forward to the Court of Appeals, which after argument rendered the opinion set forth in Appendix B.

Appeal was carried from the Court of Appeals to the Supreme Court of Ohio both as of right and on leave to certify the record. *Without certification of the record and without any possible inspection of the charged film, which reposed with the Court of Appeals pending admission to the Supreme Court of Ohio,* the Supreme Court of Ohio dismissed the appeal sua sponte for the reason that no substantial constitutional question exists. (Appendix A) Appellant argued among other constitutional arguments heretofore indicated both by brief and orally before the Supreme Court of Ohio, that the film in question was not and could not be considered as a matter of both law and fact prohibitable or punishable obscenity.

REASONS FOR ISSUING THE WRIT

INTRODUCTORY

This cause should be reversed and remanded on the authority of *State of Ohio* v. *Jacobellis*, 378 U.S. 184. In that case Ohio eagerly found the movie "The Lovers" obscene. When the case reached the Supreme Court, Justice Brennan said ". . . We have reviewed the film in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enumerated in *Roth* v. *United States* and *Albert* v. *California*". Ohio has now ignored stare decisis not only by perfunctorily affirming a conviction on a movie that is not patently offensive, does not depict total nudity or reveal genitalia, or even suggest the sexual act without even looking at the film, but indeed approves, a procedure in which the State offered *no evidence whatsoever* of deviation below the community standard, or of any act upon the part of the defendant even hinting guilty knowledge or pandering intent and the Court refused defense adduced evidence of the contrary. Indeed, hardly chastened by *Jacobellis*, the Supreme Court of Ohio even finds no substantial debatable constitutional question. Ohio elevates the presence of any sexuality, or to be charitable even a dominant theme of sexuality in the matter presented to a doctrine of prima facie proof of all the elements of the crime of disseminating obscenity. Indeed the inference of allowance of prima facie proof is inadequate. The Supreme Court of Ohio found no debatable constitutional question when the lower court refused testimony on the contemporary community standard on the part of the defense. We are indeed dealing with not merely prima facie proof but apparently an irrefutable presumption. Ohio has revenged its reversal in *Jacobellis* by enlarging Roth, which put obscenity beyond

the pale of the protection of the First Amendment by creating a doctrine that if the dominant theme is female sexual attractiveness the matter and its disseminator are apparently beyond the protection of all constitutional safeguards.

Question One. Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and following within the contemporary community standard as not appealing to prurient interests?

It has recently been made once again evident in *Robert Redrup* v. *State of New York,* 384 U.S. 916, and companion cases decided May 9, 1967 by this court, that a wide and disturbing variance exists between the constitutional boundaries of both the defindory limits and means of adjudicating obscenity as enunciated by this Court, and as applied by some state courts, particularly Ohio. (See *Ohio* v. *Jacobellis,* 378 U.S. 184, *Ohio* v. *Mapp,* 170 O.S. 427, *Ohio* v. *Mapp,* 367 U.S. 643, *State of Ohio* v. *Mazes,* 7 O.S. 2d 136, reversed No. 896 Supreme Court of the United States, Oct. Term 1966.) Yet Ohio, like many other states, persists in enlarging the severely limited exception to full expression, labeled obscenity, to an almost total possibility of obliteration of sexuality as a subject of free expression. If the matter contains indication of a sexual interest the prosecution becomes a res ipse loquitor matter with almost total exemption of the prosecution from all the normal attributes of proving a wilful crime. The possibility of a prurient reaction becomes the entire sustenance of a state's case.

Counsel has carefully seen to it that the entire reel of the film in question in this case has been forwarded to the Court for its inspection. In view of the *Redrup* deci-

sion the Court is requested to have its most naive clerk inspect the same. It is so blandly commonplace that it is almost an absurdity that we are, at this juncture, in this century involved in a charge at all. The picture is a harmless collection of pinups less revealing or suggestive than those depicted in the periodicals considered in *Gent, et al* v. *The State of Arkansas,* 384 U.S. 937 or *Austin* v. *Kentucky,* 384 U.S. 916. Nowhere in the picture is the entirely unconcealed female form shown. There is no mixing of sexes. No hectic or erotic dances are presented unless the common places of the burlesque theatre long accepted, even forty years ago in the dicta of late Justice Holmes, have after all these years suddenly become, in an exercise of pious hypocrisy, beyond the realm of widespread acceptance. There is no simulation, symbolizing, or pantomining of sexual acts. One scene was described by the trial court as follows:

> "Two women, at least nude to the waist, going through actions which lead to no conclusion in my opinion except that they were behaving like lesbians." (Appendix C)

The scene depicts nothing except two partially draped females posing who have no contact or conversation with one another, except at one point for about two seconds duration one playfully pretends to tickle the other on the *nose* with a feather. Honi soit qui mal y pense has been reversed to a point of polishing off the First Amendment in Ohio. The picture does not even show total nudity, but only a form of dance and pose so long tolerated in the national community and indeed even in the local community in which this case was tried, as to have established redeeming social importance as a mode of light entertainment.

The Court is not even faced in this matter with determining whether applying the contemporary community standards in the description or representation of sexual matters affords a reference to consensus, majority point of view, significant minority or the outer limits of toleration, a difficult issue yet to be specifically enunciated, although the inference from decisions and the logic of freedom of expression indicate the last concept already applies. The problem is not reached for the depictions of this picture are so commonplace in the light of the history of the burlesque or follies theatre in this country, the night club act, go-go girls, barracks pin-ups, and similar matters that the problem is not even posed. The State offered not a scintilla of extrinsic or relative evidence that the movie was below the community standard, nor of any other element of obscenity. Nor did the State offer any evidence whatsoever that the defendant in any way engaged in pandering in showing the picture, the trial court even barring evidence of the contrary.

Question Two. Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on any alleged obscene aspect of the motion picture in question or pandering of the picture by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

In *Friedman* v. *Maryland*, 85 S. Ct. 784, 380 U.S. 51,

this Court states "First the burden of proving that the film was unprotected expression must rest on the censor". This was stated in relation to a civil matter, not the more sensitive criminal proceeding involved herein. What happened in this case was that the prosecutor merely identified the seized movie and rested. From then on it became a defensive burden to prove it was protected utterance. An approved prosecutory procedure of proof which purports to dispense with any requirements of the adduction of evidence establishing the essential relativity which is implied in the various elements of the definition of obscenity ultimately results in the immediate imposition of unconstitutional limitations on the publics access to constitutionally protected matter. *Speiser* v. *Randall*, 357 U.S. 513, 525; *Smith* v. *California*, 361 U.S. 147; *Marcus* v. *Search Warrants of Property*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205. A depiction, isolated unto itself, gives no information as to what are the limits of candor in the nation as a whole, nor in a viable, exploratory, intellectual, searching society in which at every moment there is a fresh and bold adventure of ideas and the modes of expressing them, both in every area of essential interest to humanity including that large, intense and important area of mans interest, his own sexuality, and in variant medias each uniquely different and not necessarily known to all persons, to leave to the laws of chance and the infinite subjectivity of any particular trier of fact whether any given exploration is within the realm of this moment's community standard is prejudicial to the interests of society as a whole, much less the defendant. To assume that every trier of fact is sufficiently acquainted with the wide ranging and shifting attributes of every media, much less to the evanescent boundaries of moral attitudes, when we are engaged in a course of diminishing freedom of expresion and moral

debate by punitive action is to engender the mischief of elevating know-nothingism or taboo to a substitute for proof.

Constitutional law and the general presumption of innocence both would require some indication other than the face of the publication itself, unless it is screamingly patent obscenity, solely depicting depraved acts, of a deviation below the community standard. If no such evidence is presented, the whim of any trier of fact as to community standard is the sole criterion and this is to make of courts or juries a particularly knowledgeable and unappealable group of censors. It assumes that the community standard is a matter of common knowledge. How easy, how conformist, how bland, society would be if a certitude as to community standard was a matter of common knowledge. How abandoned would be the whole course of theatrical criticism or study of literature or art or even study of sociology and psychology if the community standard were a matter of self-asserted and understood common knowledge. How, indeed, frozen in an inflexible, unyielding, unprogressive and stifling situation, would that community standard itself be rendered if its determination was at any given time a matter of consistent instinctual common knowledge. It is an unconstitutional condition automatically invading the First Amendment for the state to present without any qualified expertise evaluating the same in the content of such experts study of modes of presentation in that given field of presentation to submit as a prima facie case for criminal judgment anything which is not totally patent and crude hard-core pornography, devoid of the merest kind of artistry. This the State entirely failed to do in its presentation of this case and its case should have been dismissed.

Both our concepts of presumption of innocence and of free expression were reversed by the modes of proof fol-

lowed in this cause. The tail of exception wags the dog of basic right. The premonitions and warnings of Mr. Justice Harlan of just this situation contained in his separate opinion in *Roth* at 354 U.S. 495 through 508 are commended to the attention of the Court.

But the violation of the First and Sixth Amendments implicit in the mode of exonerating the prosecution from proof of a wrongdoing were compounded in this cause and matured to violations of the Fourteenth and Fifth Amendments by thereupon barring the defense from defensive proof. The refusal to allow the evaluation of the presentation within the framework of the community standard by an expert learned in the practices of the particular media, not only farther diminished the potentiality of justification of expression, but enlarged the anarchy which surrounds this entire area of law. Further, it precluded the defense from any possibility of other than hortatory defense in the area of the definitory aspects of obscenity, and was a deprivation *of rights* without due process.

The issue posed by Question Two was anticipated by Justice Frankfurter in *Smith* v. *California*, *supra* at 218:

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of ques-

tioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.

"There is no external measuring rod for obscenity. Neither on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth* v. *United States*, 354 U.S. 476, 489, 1 L. ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal up-bringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards' . . ."

Additional relevant cases indicating that the power of the State to improvise presumptions or to substitute judicial notice or common knowledge in substitution for proof are limited by due process provisions of the Constitution, particularly in the context of causes diminishing the protections of the First Amendment are as follows: *Toth* v. *United States*, 319 U.S. 463; *Speiser* v. *Randall*, 357 U.S.

513; *New York Times* v. *Sullivan*, 376 U.S. 254; *Garrison* v. *Louisiana*, 379 U.S. 64; *Moore* v. *Dempsey*, 261 U.S. 86.

Question Three. Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

The question of the minimum limits of proof of the constitutionally required element of scienter in criminal obscenity procedures was before this court in *Redrup* v. *New York*, 384 U.S. 916. The question was not reached since the matter involved fell short of obscenity. It is the contention of the appellant that this latter aspect is true here as well. In the event, however, that this Court should disagree, we must still struggle herein with the scienter element. The State in this case merely proved that the film in question was exhibited to voluntary patrons on two occasions at the defendant corporation's licensed theatre. Indeed there was even failure to establish that it was the advertised billing. Even assuming that the rule under *Smith* v. *California*, 361 U.S. 147, permits that circumstances may warrant an inference that an individual handling matter was aware of its contents and its criminal import, actual or potential, and being aware thereof may be further inferred to have made an independent judgment to at least hold it out as appealing to prurient interest, (*Ginzburg* v. *United States*, 383 U.S. 463) (the assumption is not necessarily justified since *Redrup* did not reach the issue of demarcation of presumption) we are still faced with a difficult problem when we charge the corporate

entity and not the actual handling agent. As much as the individual book dealer is made a community censor by the effect of the California statute in *Smith* v. *California,* the corporate entity is forced by an exoneration of state adduced proof on the nature, scope and operating procedures of the corporation, in which specific exoneration the State of Ohio was indulged here, to precisely the frightened self-protecting, public depriving position repudiated in *Smith.* The slightest of proofs as to the most limited managerial qualities of a single cognizant agent might dissipate this impediment, but the total exoneration afforded the prosecution in this cause in an era when much of communication reposes in massive multi-agented corporate entities, constitutes too gross an impediment to the free circulation of expression. This is so evident that it even explains the compulsions to warp the actual facts adduced engaged in by the Court of Appeals of Hamilton County, earlier noted in the statement of facts (*Supra* page 7).

In *Mishkin* v. *New York,* 383 U.S. 502 at 511 this Court said:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

This language was applied to an individual defendant. When we compound the complexities of ascribation to individual mentality of an evil mens rea by making assumptions in relation to the corporate fiction, the values we seek to preserve by the requirement of scienter are even more imperiled.

Question Four. Does Ohio's statutory definition of obscenity (O.R.C. § 2905.371) which does not provide for any consideration of redeeming social importance or patent

offensiveness offend the First Amendment to the Constitution of the United States?

The legislature of Ohio chose to freeze the definition of obscenity on October 11, 1961 by amendment to Section 2905.371 of the Ohio Revised Code. Ohio defines obscenity as follows:

> "A newspaper, magazine, or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

In *Redrup* v. *New York, supra,* this Court per curiam announced as follows:

> "Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control or punish the distribution of any writings or pictures upon the ground of their 'obscenity'. A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless ' (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,' emphasizing that the 'three elements must coalesce' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value'. *Memoirs* v. *Massachusetts,* 383 U.S. 413, 418-419. Another Justice has not viewed the 'social value' element as an independent factor in the judgment of obscenity. Id. at 460-462 (dissenting opinion)." (emphasis in original)

To paraphrase the last paragraph of the *Redrup* decision which follows the above quote, whichever of the foregoing constitutional view is brought to bear upon Ohio's limited definition it is clear that Ohio has failed to provide for all the elements that must be considered before matter can be considered unprotected. The axiomatic lack of redeeming social value is ignored. The critical *patent* deviation aspect in the application of contemporary community standards is ignored. Other indefitness is contained in the grammatical interplay of Ohio's definition with the vital independent coalescence of elements noted in *Redrup* obviated thereby. Under Ohio's definition much beyond hard-core pornography is interdictable. Experience has shown that in the State and lower courts there has been massive misinterpretation of *Roth* v. *United States*, although even in that case Justice Brennan specifically enunciated the initial barrier to be overcome, an utter lack of any redeeming social importance. This Court has now time and time again had to remand or reverse in an effort to engender conceptual understanding. (*Redrup* v. *New York*, 384 U.S. 916; *Austin* v. *Kentucky*, 384 U.S. 916; *Gent* v. *Arkansas*, 384 U.S. 937; *Jacobellis* v. *Ohio*, 378 U.S. 184; *Memoirs* v. *Massachusetts*, 383 U.S. 413; *Times Film Corporation* v. *Chicago*, 355 U.S. 835; *Sunshine Book Company* v. *Summerfield*, 355 U.S. 372; *Tralins* v. *Gerstem*, 378 U.S. 576; *Grove Press, Inc.* v. *Gerstem*, 378 U.S. 577; *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478; *One, Inc.* v. *Olesen*, 355 U.S. 361; *Smith* v. *California*, 375 U.S. 259; *Weiman* v. *Updegraff*, 344 U.S. 183). Pragmatically, this history of persistent misinterpretation may perhaps be reversed by a specific determination of the unconstitutionality of a legislative ossification of an inaccurate paraphrase of a portion only of *Roth's* and subsequent criteria.

Question Five. On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

In *Jacobellis* v. *Ohio, supra,* at p. 799, this Court stated as follows:

> "Hence we reaffirm the principle that in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

Ohio chose here to exonerate itself from that duty. Without a glance at the picture — it never reached them under Ohio procedure — the Supreme Court of Ohio chose to ignore a contention that the movie involved was basically protected by the First and Fourteenth Amendments to the Federal Constitution, timely raised as an issue of *law* as well as fact. Rather Ohio sui sponde dismissed the cause as involving no debatable constitutional issue. Even assuming every state is the total master of its own appellate procedures, Ohio *having provided an appellate procedure,* may not dispense with an element thereof required by an application of the Federal Constitution. This in effect makes the accused in an obscenity case subject to unequal enforcement of the law. It is devoutly to be hoped that once the narrow limitation of *Roth's* exception to the protections of the First Amendment are understood as they were meant to be, and as this Court has reaffirmed time and time again, as lately as *Redrup, supra,* that a mode can be

established, to make of obscenity an issue of fact solely. But the very improper and ill defined application involved in the case at bar reaffirms the compelling present need of the principle quoted from *Jacobellis* above as a dike against a sea of intolerance swamping the First Amendment.

CONCLUSION

Therefore, this Court, in consideration of the five points set forth in this statement should grant an appeal from the Supreme Court of the State of Ohio, declare in violation of the 1st and 14th Amendments to the U. S. Constitution O.R.C. 2905.34 as defined by O.R.C. 2905.371 and reverse the conviction of the I. M. Amusement Corporation.

Respectfully submitted,

ALLEN BROWN
911 First National Bank Bldg.
Cincinnati, Ohio 45202

Counsel for Petitioner

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO
1967 Term

To wit February 15, 1967

No. 40574

THE STATE OF OHIO
City of Columbus

THE STATE OF OHIO,
Plaintiff-Appellee,
vs.
I. M. AMUSEMENT CORP.,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
For Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment

into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of .....

Thomas L. Startzman, Clerk

APPENDIX "B"

THE STATE OF OHIO, APPELLEE, v. I. & M. AMUSEMENTS, INC., APPELLANT.

[Cite as State v. I. & M. Amusements, Inc., 10 Ohio App. 2d 153.]

Corporations—Operation of motion picture theater—Knowledge of agent attributable to corporation—Exhibiting obscene picture—Corporation and agents guilty of offense.

1. A corporation acts solely through its agents. And the knowledge of an agent of a corporation owning and operating a motion picture theater acting within the scope of his employment will be attributed to such corporation in the ordinary operation of its motion picture theater.
2. Where the agents of a corporation which owns and operates a motion picture theater advertise and exhibit an obscene motion picture, such corporation may be guilty of the offense (exhibiting an obscene motion picture

film) along with the agents who advertise and exhibit such film on its behalf.

(No. 9578—Decided August 22, 1966.)

APPEAL: Court of Appeals for Hamilton County.

Mr. Raymond E. Shannon and *Mr. Calvin W. Prem*, for appellee.

Mr. Allen Brown and *Mr. Harry A. Abrams*, for appellant.

HOVER, J. This is an appeal as of right from a judgment against the defendant corporation in the court below wherein it was convicted of violating Section 2905.34 of the Revised Code in that it did unlawfully and knowingly exhibit an obscene motion picture film. A jury was waived in the court below and the evidence submitted solely to the judge. In this event, under the law of Ohio, the judge himself acts as the presiding officer at the trial and as a jury in determining factual issues. (See 53 Ohio Jurisprudence 2d 348 to 354, inclusive.) The appeal was heard in this court on defendant-appellant's assignments of error, a transcript of the trial proceedings including the exhibits considered by the court, and the briefs and arguments of counsel.

Defendant assigns some twenty alleged errors, of which several require consideration here. The operative facts are not in dispute. On the day before the arrest, the attention of the police was called to the movie specifically involved here by an interested civilian with whom a police officer visited the theater and viewed the motion picture. The next day two police officers returned to the theater, viewed the same motion picture, made an arrest and took possession of the evidence, that is, the film. This was viewed by the trial court sitting as a jury, and was also reviewed by this court in its examination of the record.

The film shown was advertised in the public press at the time of the showing and was the subject of a permit received by the defendant, required by city ordinance pursuant to an admission-tax ordinance of the city.

Defendant's assignments of error relative to the weight of the evidence before the jury (in this case the court) is not an appropriate subject for review here, where the record shows that there is sufficient evidence in the record, if believed by the trier of the facts, to justify the conviction.

Defendant's assignments of error relative to the defendant's intent, *mens rea* and *scienter*, are not well taken upon authority of *State* v. *Mazes*, 7 Ohio St. 2d 136; *State* v. *Mazes*, 3 Ohio App. 2d 90; and *Mishkin* v. *New York*, 383 U.S. 502, since, as it will appear, *infra*, the corporation acts solely through its agents who, in this instance, both advertised and exhibited the alleged obscene material. The knowledge of the agent acting within the scope of his employment will be attributed to the corporation in the ordinary operation of a motion picture theater. It would do violence to one's intelligence to suggest that the agents acquiring and exhibiting the corporation's product for public consumption would not be aware of the content and nature of the attraction offered at any given time.

Defendant further complains that the exhibit seized by the police and viewed as evidence by the court did not carry any title to connect it with the feature advertised by the theater.

Suffice it to say, there is no doubt that the exhibit viewed by the court below was conclusively identified by the police witnesses as the film exhibited at the theater performance. It might well be observed at this point, in the words of the poet, that "a rose by any other name would smell as sweet."

The same thing might be said of the defense expert witness on the subject of motion picture standards and prac-

tices, that the one segment of the film in question was simply "a documentation of moving pinups, in some cases static pinups,"—a pinup being "simply females who are, who have exposed, who are undressed within the convention of a pinup. A pinup is simply a convention of undress which excludes any dress other than a covering in the lower regions of some standard form. The movie I say was a documentation of a series of pinups who, in some cases, were in motion. In most cases were static."

The expert witness defines a convention, as he uses the term, as "an established and presumably accepted form of appearance and performance that is established over the years as being a conventional way of appearing and performing for whatever purpose in artistic endeavor." Obviously, this does not conform to the standards of obscenity set out in the *Roth* v. *United States*, 354 U.S. 476, nor is it helpful in defining the standards of this community. The statute as written and interpreted sets out no special standards or exceptions for theatrical presentation, and the law must apply the same obscenity standard to any material regardless of the medium of circulation or exhibition.

In addition to either the static or moving pinups, the court below made a specific finding in regard to one series of scenes in the film that, "two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians."

Lastly, as pointed out in *State* v. *Carney*, 113 Ohio App. 280, the corporation may be equally guilty of an offense along with those individuals who perform the same acts on its behalf. The court states correctly at page 283:

"* * * If a corporation offends, it is necessary that it do so through the action of an individual; if an individual offends, either on his own account or on behalf of a corpora-

tion, either he or both are criminally responsible. One may be the principal offender while the other aids, abets or procures the commission of the offense. Section 1.17, Revised Code. The guilt of one will not exculpate the other."

There is a thorough discussion of the criminal liability of corporations, even where intent or malice or similar mental states are involved, acting through agents within the scope of their authority. See 19 Corpus Juris Secundum 1073 through 1079.

In view of the foregoing, it is the opinion of this court that there was no error prejudicial to the rights of defendant in the trial below, and the verdict and judgment are, accordingly, affirmed.

Judgment affirmed.

HILDEBRANT, P. J., and LONG, J., concur.

APPENDIX "C"

OPINION OF THE COURT OF COMMON PLEAS, Hamilton County, Ohio

No. 83080

STATE OF OHIO,

Plaintiff,

vs.

I. M. AMUSEMENTS, INC.,

Defendant.

RECORD — PAGE 67

"THE COURT: The film in question here was exhibited in the courtroom. The first scene of that film depicted two women, nude at least to their waists, going through actions that could lead to no conclusion, in my opinion, except that they were behaving like Lesbians.

There were other parts of the picture in which there were absolutely nude women.

There is no question in the Court's mind, nor has there been since this picture was viewed, but that it came within the purview of the statute.

There is no question but that an offense under the law of Ohio has been committed.

There is no question but that the defendant corporation is the one that committed the offense, and so the Court finds the defendant guilty as charged in the indictment.

The sentence and judgment of the Court is that the

defendant corporation be fined the sum of $250.00 and costs, and desist from the showing of this film."*

* Appellant's note:

The Ohio statute involved (O.R.C. 2905.34) provides no authority for the court to enjoin or make part of sentence injunction against further presentation. This unenforceable gratuity on the part of the Court is inexplicable, save perhaps in psychological terms.

APPENDIX "D"

O. R. C. § 2905.34

No person shall knowingly, sell, lend, give away, exhibit, or offer to sell, lend, give away or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or ac-

counts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor any of such books, papers, magazines, or pictures.

Whoever violates this section shall be finde not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.

O.R.C. § 2905.371

Sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any newspaper, magazine, or other publication which is entered as second class matter by the post-office department. This immunity shall not apply to any newspaper, magazine, or other publication which is obscene. A newspaper, magazine, or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.